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NGUYEN QUOC VIET v. PP

COURT OF APPEAL, PUTRAJAYA
MOHTARUDIN BAKI JCA
AHMADI ASNAWI JCA
ABDUL RAHMAN SEBLI JCA
B [CRIMINAL APPEAL NO: K-05-203-08-2013]
24 NOVEMBER 2015

CRIMINAL LAW: *Penal Code – Section 302 – Murder – Whether accused had motive to murder deceased – Whether defence bare denial and afterthought – Whether defence cast reasonable doubt on prosecution's case – Whether conviction and sentence safe*

C

EVIDENCE: *Adverse inference – Non-calling of material witness – Failure of prosecution to call material witness – Accused convicted for murder and sentenced to death – Five people were present at crime scene but none were called to testify – Whether adverse inference ought to be invoked – Evidence Act 1950, s. 114(g)*

D

EVIDENCE: *Circumstantial evidence – Murder – Accused convicted for murder and sentenced to death – Accused wearing t-shirt with blood stains on collar when arrested – Knife found near deceased's body – Whether circumstantial evidence could link accused person to murder – Whether sufficient to sustain finding that accused committed offence*

E

EVIDENCE: *Statement – Unsworn statement from dock – Accused convicted for murder and sentenced to death – Penal Code, s. 302 – Accused gave unsworn statement in defence – Whether unsworn statement carried weight*

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The appellant and the deceased were both Vietnamese nationals living in a workers' hostel. The two were seen by a fellow housemate ('SP5') having a conversation at 6.30pm. At about 9.30pm, the appellant's manager ('SP6') received a telephone call that a fight had occurred at the hostel. On arrival at the hostel, SP6 saw the deceased, who was also his employee, lying dead on a mattress and covered with a piece of cloth. There was a knife near the deceased's body. When the appellant was arrested by the police at a nearby clinic, the collar of the t-shirt he was wearing was stained with blood. The appellant was charged at the High Court for murder, an offence under s. 302 of the Penal Code. At the end of the prosecution's case, the trial judge acquitted and discharged the appellant on account of the prosecution's failure to prove a *prima facie* case. However, upon appeal, the Court of Appeal ordered the appellant to enter his defence before the same trial judge. The appellant gave an unsworn statement in his defence that he had heard noises and screams as though there were people fighting. The appellant then found the deceased sprawling on the floor, covered in blood. The appellant carried and placed the deceased on a mattress. While seeking emergency aid to save the deceased, he was arrested by the police. The trial judge held that the

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defence was a bare denial, an afterthought and had failed to raise a reasonable doubt on the prosecution's case. The appellant was convicted as per the charge and sentenced to death. Hence, the present appeal. The appellants submitted that the trial judge erred in law and in fact (i) when His Lordship failed to take into account and consider the whole evidence adduced, both during the prosecution and the defence stage before arriving at his decision; and (ii) when His Lordship relied solely on the Court of Appeal's decision calling the appellant to enter his defence as evidence that the prosecution had proven that the appellant had inflicted the injury upon the deceased that caused his death even though it was not clear under which limb of s. 300 of the Penal Code that the act that caused the said death was occasioned. As such, failure by the judge to do so had occasioned a breach of s. 182A(1) of the Criminal Procedure Code ('CPC') which was serious enough to amount to a misdirection.

Held (allowing appeal; setting aside order of conviction and sentence of High Court and acquitting and discharging appellant)
Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The trial judge did not consider all the evidence adduced before him which included the evidence adduced during the stage of the prosecution's case before coming to the finding that the prosecution had proven its case beyond reasonable doubt against the appellant. His Lordship was in clear breach of s. 182(A)(1) of the CPC which requires that the court shall consider all the evidence before it at the conclusion of the trial and shall decide whether the prosecution had proved its case beyond reasonable doubt. This is the obligatory responsibility of the trial judge. The trial judge's decision that the defence failed to cast a reasonable doubt on the prosecution's case was apparently premised upon a flawed application of the law. (paras 14 & 16)

(2) An unsworn statement is not evidence as it is not given under oath. Such a statement carried little weight as the appellant could not be subjected to cross-examination by the prosecution nor could he be questioned by the trial judge. The appellant's statement was amply corroborated by the evidence adduced by the prosecution itself. SP5 saw the appellant talking to the deceased at about 6.30pm on the day of the incident but that was more than two hours before the incident. SP5 was not even at the scene at the time the deceased was stabbed. SP5's testimony did not reveal how the deceased suffered the injury and equally had no nexus with the culpability of the appellant. (paras 18 & 20)

(3) SP6 testified that there were at least 12 workers living in the hostel and according to the investigation officer, he was informed that there were at least five people at the scene when the deceased was stabbed. Formal statements were taken from these five people but none of them were called to testify or offered to the defence. There was no explanation

given by the prosecution to account for such failure. In such event, the invocation of the adverse inference rule under s. 114(g) of the Evidence Act 1950 to operate adversely against the prosecution, was in order. (para 21)

(4) There was no evidence to link the knife with the appellant or that the appellant had used the knife to cause the said injury upon the deceased. No finger print of the deceased was lifted from any part of the said knife and the DNA analysis equally did not reveal the presence of the appellant's DNA profile on any part of the said knife. In all probability, someone had used the said knife to stab the deceased but that someone could not be fastened to the appellant for want of evidence. (para 22)

(5) The circumstantial evidence relied by the prosecution was too weak to fasten the appellant with the commission of the offence. At best, the only link was the presence of the blood stains belonging to the deceased on the t-shirt worn by the appellant at the material time. However, this alone was insufficient to sustain a finding that the appellant did commit the offence. Furthermore, the appellant had given an explanation pertaining to the presence of the deceased's blood stains on his t-shirt. (paras 23 & 24)

(6) The appellant had explained why he was at or near the vicinity of the clinic. His explanation was probable and reasonable. He was not injured and had no reason to go to the clinic. It lends credence to his explanation that he went to the clinic to seek treatment for the deceased. In the absence of any evidence to the contrary, the benefit of the doubt ought to be given to the appellant. His defence was not mired in mere denial and afterthought. The conviction of the appellant of the offence was unsafe. (paras 23 & 24)

Bahasa Malaysia *Headnotes*

Perayu dan si mati kedua-duanya warganegara Vietnam yang tinggal di hostel pekerja. Mereka dilihat oleh seorang teman serumah ('SP5'), sedang bercakap-cakap pada pukul 6.30 petang. Kira-kira pukul 9.30 malam, pengurus perayu ('SP6') menerima panggilan telefon bahawa satu pergaduhan berlaku di hostel. Setibanya di hostel, SP6 melihat si mati, yang juga pekerjanya, mati terbaring di atas tilam dan diselubungi sehelai kain. Terdapat pisau berdekatan badan si mati. Semasa perayu ditahan oleh pihak polis di klinik berdekatan, kolar kemeja-T yang dipakainya terdapat kesan darah. Perayu dipertuduh di Mahkamah Tinggi kerana membunuh, satu kesalahan di bawah s. 302 Kanun Keseksaan. Di akhir kes pendakwaan, hakim bicara melepaskan dan membebaskan perayu atas kegagalan pihak pendakwaan membuktikan kes *prima facie*. Walau bagaimanapun, atas rayuan, Mahkamah Rayuan memerintahkan perayu membela diri di hadapan hakim bicara yang sama. Perayu memberi kenyataan tidak bersumpah dalam pembelaannya bahawa dia mendengar bunyi dan jeritan, seolah-olah ada

orang bergaduh. Perayu kemudiannya menjumpai si mati tergelimpang di atas lantai, berlumuran darah. Perayu mengangkat si mati dan meletakkannya di atas tilam. Ketika mencari pertolongan untuk menyelamatkan si mati, dia ditahan oleh pihak polis. Hakim bicara memutuskan bahawa pembelaan tersebut cuma penafian semata-mata, satu fikiran semula dan gagal membangkitkan keraguan munasabah terhadap kes pihak pendakwaan. Perayu disabitkan atas kesalahan dan dijatuhkan hukuman mati. Oleh itu, rayuan ini. Perayu-perayu menghujahkan bahawa hakim bicara khilaf dalam undang-undang dan fakta (i) apabila beliau gagal mengambil kira dan mempertimbangkan semua keterangan yang dikemukakan semasa peringkat pendakwaan dan pembelaan sebelum membuat keputusan; dan (ii) apabila beliau bergantung sepenuhnya pada keputusan Mahkamah Rayuan dalam memanggil perayu membela diri sebagai keterangan kerana pihak pendakwaan telah membuktikan perayu menyebabkan kecederaan terhadap si mati yang membawa kepada kematian walaupun tidak jelas tindakan yang menyebabkan kematian tersebut terjumlah di bawah cabang s. 300 Kanun Keseksaan yang mana. Oleh itu, kegagalan hakim berbuat sedemikian menyebabkan pelanggaran s. 182A Kanun Tatacara Jenayah ('KTJ') yang cukup serius untuk terjumlah sebagai satu salah arah.

Diputuskan (membenarkan rayuan; mengetepikan perintah sabitan dan hukuman oleh Mahkamah Tingi dan melepaskan dan membebaskan perayu)

Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara langsung tidak mempertimbangkan semua keterangan yang dikemukakan termasuk keterangan pada peringkat pendakwaan, sebelum memutuskan pihak pendakwaan berjaya membuktikan kes terhadap perayu melampaui keraguan munasabah. Beliau jelas melanggar s. 182(A)(1) KTJ yang mengkehendaki agar mahkamah mempertimbangkan semua keterangan yang dikemukakan di akhir perbicaraan dan perlu memutuskan sama ada pihak pendakwaan berjaya membuktikan kes melampaui keraguan munasabah. Ini tanggungjawab wajib bagi hakim bicara. Keputusan hakim bicara bahawa pihak pembelaan gagal menimbulkan keraguan munasabah terhadap kes pihak pendakwaan kelihatan berasaskan salah pemakaian undang-undang.

(2) Kenyataan tidak bersumpah bukan keterangan kerana tidak diberi secara bersumpah. Kenyataan sedemikian kurang nilainya kerana perayu tidak boleh disoal balas mahupun disoal oleh hakim bicara. Kenyataan perayu banyak disokong oleh keterangan yang dikemukakan oleh pihak pendakwaan sendiri. SP5 melihat perayu bercakap-cakap dengan si mati kira-kira pukul 6.30 petang pada hari kejadian tetapi itu lebih dua jam

A sebelum insiden. SP5 tiada di tempat kejadian semasa si mati ditikam. Keterangan SP5 tidak mendedahkan bagaimana si mati tercedera dan tiada kaitan dengan kebersalahan perayu.

(3) SP6 memberi keterangan bahawa terdapat tidak kurang 12 pekerja yang tinggal di hostel dan menurut pegawai siasatan, dia dimaklumkan B bahawa tidak kurang lima orang pekerja yang berada di tempat kejadian semasa si mati ditikam. Kenyataan rasmi diambil daripada lima orang ini tetapi tidak seorang pun dipanggil memberi keterangan atau ditawarkan kepada pihak pembelaan. Penjelasan tentang kegagalan ini tidak diberi oleh pihak pendakwaan. Dalam keadaan ini, anggapan C bertentangan di bawah s. 114(g) Akta Keterangan 1950 wajar dibangkitkan terhadap pihak pendakwaan.

(4) Tiada keterangan yang mengaitkan pisau dengan perayu atau bahawa perayu meggunakan pisau itu untuk menyebabkan kecederaan terhadap si mati. Cap jari si mati tidak diperolehi daripada mana-mana bahagian D pisau dah analisis DNA juga tidak mendedahkan kewujudan profil DNA perayu pada mana-mana bahagian pisau. Kemungkinan besar seseorang menggunakan pisau tersebut untuk menikam si mati tetapi orang itu bukan tertuduh kerana tiada bukti.

E **(5)** Keterangan ikut keadaan yang menjadi sandaran pihak pendakwaan terlalu lemah untuk mengaitkan perayu dengan kesalahan tersebut. Satu-satunya kaitan adalah kewujudan kesan darah milik si mati pada kemeja-T yang dipakai oleh perayu pada masa material. Walau bagaimanapun, ini tidak cukup untuk memutuskan bahawa perayu melakukan kesalahan. Tambahan lagi, perayu telah memberi penjelasan mengenai kewujudan F kesan darah si mati pada kemeja-T yang dipakainya.

(6) Perayu telah memberi penjelasan mengapa dia berada di klinik atau berdekatannya. Penjelasan ini berkebarangkalian dan munasabah. Perayu tidak tercedera dan tidak ada sebab untuk ke klinik. Ini G menyokong penjelasannya bahawa dia pergi ke klinik untuk mendapatkan rawatan bagi si mati. Tanpa keterangan sebaliknya, manfaat keraguan harus diberi kepada perayu. Pembelaannya tidak berbaur penafian dan fikiran semula. Sabitan terhadap perayu atas kesalahan tidak selamat.

H **Case(s) referred to:**
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2015] 2 CLJ 145 FC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Lee Boon Gan (F) v. Regina [1954] 1 LNS 39 HC ***(refd)***
Mohamed Salleh v. PP [1968] 1 LNS 80 FC ***(refd)***
I *PP v. Sanassi [1970] 1 LNS 118 HC* ***(refd)***
Wong Heng Fatt v. PP [1958] 1 LNS 96 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A(1)
Evidence Act 1950, ss. 32, 114(g)
Penal Code, ss. 300, 302

For the appellant - Naran Singh; M/s Naran Singh & Co
For the respondent - Kwan Li Sa; DPP

[Appeal from High Court, Alor Setar; Criminal Trial No: 45B-36-09-2011 (overruled)]

Reported by Najib Tamby

JUDGMENT

Ahmadi Asnawi JCA:

[1] In the court below, the appellant was charged as follows:

> Bahawa kamu pada 8 November 2010, pada jam lebih kurang 8.50 malam, bertempat di asrama pekerja, Tingkat 1, No. 156-B, Pekan Jitra, di dalam Daerah Kubang Pasu, di dalam Negeri Kedah Darul Aman, telah melakukan pembunuhan ke atas Nguyen Van Thuy (warganegara Vietnam, No Passport B4318169). Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] At the end of the prosecution's case the learned judge ordered the acquittal and discharged of the appellant on account of the prosecution's failure to prove a *prima facie* case against the appellant upon the charge proffered. However, upon appeal, the Court of Appeal ordered the appellant to enter his defence before the same learned judge.

[3] The appellant gave an unsworn statement from the dock in his defence. At the end of the defence, the appellant was found guilty of the offence and was convicted of the same. He was sentenced to suffer the death penalty.

[4] The appeal before us was in respect of the said conviction and sentence. After due consideration of the issues raised, we allowed the appeal. The appellant was henceforth acquitted and discharged of the offence. We now give our grounds.

The Case For The Prosecution

[5] The narratives are as follows:

(a) The appellant, a Vietnamese national, was an employee of Syarikat Double Site Sdn Bhd and was housed in a workers hostel as indicated in the charge together with 12 other fellow Vietnamese employees. The deceased Nguyen Van Thuy, also a Vietnamese national, was also staying/living in the said hostel.

A (b) On 8 November 2010, at about 6.30pm, SP5 (Nguyen Dan Bac, also a Vietnamese national) a fellow housemate of the deceased and the appellant, arrived at the hostel. He was back from work. He saw both the deceased and respondent having conversation.

B (c) At about 9.30pm, SP6 (Poo Wai Seong), the manager of Syarikat Double Site Sdn Bhd, received a telephone call from his employee, one Firdaus, that a fight had occurred at the said hostel. He proceeded to the hostel to investigate.

C (d) On arrival at the said hostel, he saw one of his employees, the deceased, lying dead on a mattress. The deceased's body was covered with a piece of cloth. There was also a knife near the deceased's body.

D (e) At about 11pm the same night, SP8 (Supt Ibrahim Mohamed Yusof), managed to detain the appellant near Klinik Lee Surgery within the township area. The appellant then appeared to be moving in such a hurry.

E (f) The appellant was later handed to the investigating officer (IO) of the case, SP11 (ASP Anuar Bakri bin Abdul Salam). He proceeded to seize the t-shirt and trousers then worn by the appellant. According to SP11, he seized the items because there were blood stains on the collar of the said t-shirt worn by the appellant.

F (g) The forensic pathologist, SP10 (Dr Mohd Suhani Mohd Noor), who conducted the post mortem upon the deceased's body concluded that the deceased died due to stab wound to the heart. The decease suffered no other injuries. SP10 also ruled out the possibility that the said fatal stab wound was self inflicted or accidental.

Findings Of The Trial Judge At The End Of The Prosecution's Case

[6] The learned judge found that there was no direct evidence to link the appellant with the death of the deceased. Equally the learned judge found that
G the circumstantial evidence relied upon by the prosecution to link the appellant with the commission of the offence ie, the appellant was seen talking with the deceased about two hours before the deceased was found fatally wounded; that there were blood stains on the t-shirt worn by the appellant bearing the DNA profile of the deceased; and that the appellant had
H fled the scene and was arrested about two hours later near Klinik Lee Surgery, can hardly be said to be strong enough to lead to the only conclusion that the fatal injury suffered by the deceased was occasioned singularly by the act of the appellant. The learned judge ruled that the prosecution had failed to prove a *prima facie* case against the appellant upon the charge as proffered. The appellant was thus ordered to be acquitted and discharged of the offence.
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The Case For The Defence

[7] Aggrieved by the said decision, the honourable Public Prosecutor lodged an appeal to the Court of Appeal. On 14 March 2013, the Court of Appeal allowed the said appeal and ordered the appellant to enter his defence before the same learned judge.

[8] The appellant gave an unsworn statement from the dock in his defence and posited, at p. 4, rekod rayuan tambahan (RRT):

(a) He was at the said hostel at about 8.50pm on the day of the incident together with the deceased, SP5 and 12 other fellow Vietnamese workers.

(b) He spoke for a while with the deceased in the presence of SP5, after which he left for the toilet to answer the call of nature.

(c) While in the toilet he heard noises and screams as though there were people fighting (bergaduh) outside.

(d) He left the toilet and had a shock when he saw the deceased sprawling on the floor, covered in blood. He approached the deceased and found that the deceased was seriously injured. He carried the deceased and placed the deceased on a red coloured mattress as shown in photographs No. 23 and 24 at p. 141 of the rekod rayuan (RR).

(e) One of the bloodied hand and shoulders of the deceased came into contact with the shirt he was wearing as the said hand was upon his shoulders when he carried and placed the deceased on the mattress.

(f) After placing the deceased on the said mattress, he hurried to look for emergency aid to save the deceased as there appeared to be no one in the said hostel.

(g) He proceeded on foot to a clinic within the vicinity to seek emergency aid. However he got arrested by the police near the clinic.

(h) The appellant reiterated that the deceased was never his enemy, had never crossed-path or had any misunderstanding with the deceased and had harboured no motive to murder the deceased.

Findings Of The Trial Judge At The End Of The Defence Case

[9] The learned judge found that the defence was a bare denial and an afterthought on account of the failure to raise the issues adverted to in his defence in the cross-examination of the prosecution witnesses. The defence had failed to raise a reasonable doubt upon the prosecution case. Hence the appellant was found guilty and convicted of the offence of murder under s. 302 of the Penal Code (PC) and accordingly sentenced to suffer the death penalty.

A **The Appeal Before Us**

[10] The appellant posited two grounds of appeal:

(a) The learned judge erred in law and in fact when he failed to take into account and consider the whole evidence adduced, both during the
B prosecution and the defence stage before arriving at his decision; and

(b) The learned judge erred in law and in fact when he relied solely upon the Court of Appeal's decision calling the appellant to enter his defence as evidence that the prosecution has proven that the appellant had inflicted the injury upon the deceased that caused his death even though
C it is not clear under which limb of s. 300 of the PC that the act that caused the said death was occasioned.

[11] As regards to the first ground, learned counsel submitted that the failure by the learned judge to do so had occasioned a breach of s. 182A(1) of the Criminal Procedure Code (CPC) which is serious enough to amount
D to a misdirection. He relied upon *Gooi Loo Seng v. PP* [1993] 3 CLJ 1; [1993] 2 MLJ 137 to fortify his contention. In so far as the second ground is concerned, learned counsel contended that there is no evidence adduced to link the appellant with the commission of the offence.

E **Our Findings**

[12] We proposed to deal with the two grounds together as they appeared to be interwoven.

[13] The core of the learned judge's decision in convicting the appellant appeared at paras. 29 to 31 of his grounds of judgment (at pp. 47 to 49 of
F RRT). We reproduced the same below for purposes of clarity:

> [29] Di dalam kes ini pembelaan telah diarahkan oleh Mahkamah Rayuan setelah membenarkan rayuan Pendakwa Raya. Berdasarkan prinsip-prinsip undang-undang yang menghendaki mahkamah memberi pertimbangan maksima ke atas keterangan pihak pendakwaan, saya yakin Mahkamah
> G Rayuan telah membuat pertimbangan sedemikian dan telah berpuashati bahawa keterangan pihak pendakwa telah membuktikan bahawa OKT telah mengenakan kecederaan badan ke atas si mati yang menyebabkan kematiannya dan perbuatan OKT mengenakan kecederaan badan ke atas si mati tersebut terjatuh di bawah salah satu keadaan di bawah s. 300 Kanun Keseksaan; walaupun tidak jelas di dalam kes ini yang mana
> H satukah keadaan tersebut.
>
> [30] Dengan demikian pembelaan OKT sekarang perlulah menimbulkan keraguan yang munasabah ke atas kes *prima facie* tersebut. Berdasarkan pembelaan OKT melalui penyataannya, OKT sama sekali menafikan mengenakan kecederaan tubuh badan ke atas si mati. Pembelaan ini jelas
> I satu penafian yang tidak disokong oleh keterangan lain. Pembelaan ini juga satu pembelaan yang difikirkan kemudian kerana pembelaan yang ditimbulkan ini tidak pernah ditimbulkan semasa pemeriksaan balas ke atas saksi-saksi pendakwaan.

> [31] Di dalam keadaan yang sedemikian saya mendapati pembelaan OKT telah gagal menimbulkan keraguan yang munasabah ke atas kes pendakwaan. OKT didapati bersalah dan disabitkan dengan kesalahan yang boleh dihukum di bawah s. 302 Kanun Keseksaan.

[14] The paragraphs reproduced above were the only reference made by the learned judge in respect of the appellant's defence in his entire judgment. It is apparent that the learned judge did not consider all the evidence adduced before him which includes the evidence adduced during the stage of the prosecution's case before coming to the finding that the prosecution has proven its case beyond reasonable doubt against the appellant, in clear breach of the provision of s. 182A(1) of the CPC which requires that the court shall consider all the evidence before it at the conclusion of the trial and shall decide whether the prosecution has proved its case beyond reasonable doubt. This is the obligatory responsibility of the trial judge.

[15] The Federal Court in *Balachandran v. PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301, explained what can be said to have been proved beyond reasonable doubt in the following terms:

> Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt, the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. *Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s. 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence*. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The *prima facie* evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt. (emphasis added)

[16] The learned judge clearly conducted no exercise to re-evaluate the appellant's unsworn statement in the light of the evidence adduced by the prosecution in breach of s. 182A(1) of the CPC and as further propounded by the decision in *Balachandran* cited above. The learned judge's decision that the defence of the appellant has failed to cast a reasonable doubt upon the prosecution's case is apparently premised upon a flawed application of the law.

[17] In the event we were with learned counsel's submissions that the failure of the learned judge to consider all the evidence adduced before him before deciding that the prosecution has proved its case beyond reasonable doubt in breach of s. 182A(1) of the CPC, verily amounted to a serious misdirection which warrants our intervention.

[18] The appellant gave an unsworn statement in his defence. An unsworn statement is not evidence as it is not given under oath and the accused cannot be cross-examined on his unsworn statement - see *PP v. Sanassi* [1970] 1 LNS 118; [1970] 2 MLJ 198; *Wong Heng Fatt v. PP* [1958] 1 LNS 96; *Mohamed Salleh v. PP* [1968] 1 LNS 80; [1969] 1 MLJ 104. Such a statement carries little weight as he is not subject to cross-examination by the prosecution nor can he be questioned by the trial judge - see *Dato Seri Anwar Ibrahim v. PP & Another Appeal* [2015] 2 CLJ 145. However, for what it is worth the unsworn statement must be evaluated by the trial judge although it may not be, strictly speaking, evidence and conclude whether though of little weightage, it has not or it has nevertheless created a reasonable doubt upon the prosecution's case, regard being had to the surrounding circumstances and other available evidence that may corroborate the unsworn statement - see *Lee Boon Gan (F) v. Regina* [1954] 1 LNS 39; [1954] 2 MLJ 103.

[19] The appellant, in his unsworn statement, denied having anything to do with the injury suffered by deceased that eventually caused his death. He claimed he has no knowledge as to what had happened to the deceased as he was in the toilet at the material time.

[20] It appeared to us that the appellant's statement was amply corroborated by the evidence adduced by the prosecution itself. SP5 saw the appellant talking with the deceased at about 6.30pm on the day of the incident. That was more than two hours before the incident, which according to the prosecution took place at about 8.50pm. SP5 added that he did not know what took place thereafter as he had gone elsewhere to mend his wardrobe. In the circumstances, we could not see how SP5's testimony could be taken to link the appellant with the commission of the offence. Going by his testimony, SP5 was not even at the scene at the time the deceased suffered the said stab wound. SP5's testimony did not reveal how the deceased suffered the injury and equally has no nexus with the culpability of the appellant.

[21] SP6 testified that there were at least 12 workers staying in the hostel and SP11, the IO of the case, said that in the course of his investigation, he was informed that there were at least five people at the scene at the material time the deceased was stabbed. He took formal statements from these five persons. However, none of these potential witnesses were called to testify or offered to the defence. There was no explanation given by the prosecution to account for such failure. Their statements were neither tendered in court under s. 32 of the Evidence Act 1950, in the event that they were no longer around and could not be traced. In such event, the invocation of the adverse inference rule under s. 114(g) of the same Act to operate adversely against the prosecution, is in order.

[22] The recovery of the knife, exh. P11B, near the deceased's body is of no consequence either to the prosecution nor the appellant. In all probability the said knife was the weapon used to cause the stab wound upon the

deceased as the DNA profile of the deceased was developed from the blood stains found on the knife - see chemist report, exh. P7 at p. 168, RR. However there is no evidence to link the knife with the appellant or that the appellant had used the knife to cause the said injury upon the deceased. No finger print of the appellant was lifted from any part of the said knife and the DNA analysis equally did not reveal the presence of the appellant's DNA profile on any part of the said knife. In such event we could only conclude that in all probability someone had used the said knife to stab the deceased but that someone cannot be fastened to the appellant for want of evidence.

[23] The appellant has given an explanation pertaining to the presence of the deceased's blood stains on his t-shirt. He also explained why he was at or near the vicinity of Klinik Lee Surgery - see paras. 8.5, 8.6 and 8.7. We opined his explanations on both counts to be probable and reasonable. He was not injured and hence has no reason to go to the clinic. It lend credence to his explanation that he went to the clinic to seek treatment for the deceased. In the absence of any evidence to the contrary, the benefit of the doubt ought to be given to the appellant. His defence is not mired in mere denial and afterthought.

[24] We were also of the view that the circumstantial evidence relied by the prosecution is too weak to fastened the appellant with the commission of the offence. At the highest, the only link to establish the commission of the offence with the appellant is the presence of blood stains belonging to the deceased on the t-shirt worn by the appellant at the material time. However, this alone is insufficient to sustain a finding that the appellant did commit the offence. Additionally the appellant has given an explanation to account for the same which we opined to be probable and reasonable.

[25] For all the reasons enumerated above we found the conviction of the appellant of the offence to be unsafe. We therefore unanimously allowed the appeal. We set aside the order of conviction and sentence of the High Court. The appellant is ordered to be acquitted and discharged of the offence.